No. 2355

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EZRA J. NIXON and
LARUE O. NIXON,

Appellants,

vs.

H. W. HEERS and
H. W. HEERS, INC.,
a Corporation,

Appellees.



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On Appeal From the United States District Court
For The Central District of California

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# APPELLANTS' BRIEF

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## STATEMENT OF JURISDICTIONAL FACTS

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Jurisdiction of the Federal Court in this case is found on diversity of citizenship between the parties (§1332, Title 28, United States Code).

Appellants (plaintiffs in the court below) are residents and citizens of the State of Utah. (See complaint R. 2, and Finding No. 1, R. 114). Appellee H.

H. W. Heers, Inc., (one of the defendants) is a corporation organized under the laws of California, with its principal place of business there; and Appellee H. W. Heers individually (the other defendant) is a resident and citizen of the State of California. (See Complaint R. 2, and Finding No. 2, R. 114, 115).

Likewise, the amount in controversy exceeds the sum of $10,000., exclusive of interest and costs. (See Complaint, R. 2, and Finding of Fact No. 3, R. 115).

## STATEMENT OF THE CASE

Appellants brought this action in the United States District Court for the Central District of California to recover the balance of $107,500., plus interest, attorney fees, and costs, owing by Appellees on a certain promissory note executed and delivered in Utah by Appellees to Appellants.

The complaint filed in the lower court alleges, and the trial court specifically found, that "on or about September 20, 1961, for a valuable consideration * * * *, * *, defendants, H. W. Heers and H. W. Heers, Inc., made, executed, and delivered to the plaintiffs in the State of Utah their promissory note in the principal sum of $171,563.66." (R. 115).

The promissory note provided in part that "All payments whether of principal or interest are to be paid either in cash, or at the election of the promisor, in notes secured by deeds of trust; provided, however, that the election to pay any installment or any part thereof in notes shall not constitute an election to pay the balance, whether of principal or of interest, in notes." (R. 116)

One installment was paid by Appellees, after which no payments were made, thereby requiring Appellants to take legal action, which was done. (R. 117, 118). Appellants first proceeded to foreclose their second mortgage on the property through the courts in Utah. (R. 118, 119). The proceeds derived from the Sheriff's sale, which was duly and regularly held, were applied on the indebtedness owing, resulting in an unpaid balance owing on said promissory note of $107,500., together with $19,229.69 interest to July 17, 1965. (R. 119, 120).

The trial court further found that under the law of the State of Utah, where the note was executed and made payable, a maker of a note secured by a mortgage on real property is not exonerated from payment of the note by the foreclosure of the mortgage and that "a deficiency judgment is authorized and permitted." (R. 120).

## SPECIFICATION OF ERRORS

The sole issue to be determined by this appeal is whether the trial court erred in finding (and thereafter incorporating such finding in the Conclusions of Law and Judgment) that the principal amount of the note, together with accrued interest thereon, "may be paid and satisfied by defendants' delivery to plaintiffs bona fide notes secured by valid deeds of trust." (R. 120).

## ARGUMENT

### THE TRIAL COURT ERRED IN PERMITTING APPELLEES TO PAY THE PRINCIPAL AND INTEREST OWING ON THE NOTE BY "DELIVERY TO PLAINTIFFS BONA FIDE NOTES SECURED BY VALID DEEDS OF TRUST."

As hereinbefore stated, the promissory note which Appellees executed and delivered to Appellants contained a provision that payments of either principal or interest were to be made "either in cash, or at the election of the promisor, in notes secured by deeds of trust; provided, however, that the election to pay any installment or any part thereof in notes shall not constitute an election to pay the balance, whether of principal or of interest, in notes." (R. 116).

Although Appellees failed to raise any issue on the mode or right of election of payment, (nor was any such issue framed in the Pre-Trial Conference Order) the trial court at the time of rendering its decision from the Bench, commented:

> "Supposing I find in favor of the plaintiff and order payment. Why can't I, in ordering payment, follow the terms of your contract and say that the payments of the balance due should be in cash or in notes secured by deeds of trust? I would like to have your opinion on that." (Tr. 191, 192)

After discussing the matter with the Court, Counsel for Appellants responded:

> "The position we take, at this point, is that he is no longer in a position to exercise that." (Tr. 196)

Counsel further argued:

> ". . . he has come into court and has denied that he is liable for any payment and has not set up as any defense that he is entitled to pay it in any other manner than in cash.
>
> "So, we maintain that he should be required to pay in cash." (Tr. 197)

After counsel later advised the court that "we sued for a specific amount of money and the issue that was framed at the pre-trial was what was the amount that was unpaid at that time on the note," the Court decided:

> "THE COURT: I am going to find that there is so much due in money, but payment can be made either in cash or in trust deeds.
>
> "MR. NIELSEN: Well, I submit, as I said, your Honor, that we feel that the defendant has no right at this time to assert a claim.
>
> "THE COURT: I assume that you have a perfect right to take this up to the Circuit and if I have been wrong, the Circuit will have no hesitancy in telling me so.
>
> "Now, there is one other question here which should be solved and that is the question of attorney's fees. Now, the contract doesn't say anything about paying attorney's fees in trust deeds, so the attorney's fees will be paid in cash." (Tr. 198)

Since no issue had been raised in the pleadings or pre-trial order as to the right of Appellees to pay the note

in any other manner than by cash, very little evidence in the case appears in the Record. However, at the outset of the trial it was stipulated between the parties that if the plaintiff Ezra J. Nixon were called as a witness he would testify as to the payments made, and the dates, with the computations of the balance owing together with interest, all as set forth in the Transcript. (See pp. 49, 50).

Later during the trial the court inquired of Mr. Nixon as to whether any payments had been made by Appellees or anyone else on the note after January 2, 1962, to which the witness responded, "Nothing." (Tr. 160).

The general statement of the law applicable to the situation now before the Court is contained in 40 Am. Jur. PAYMENT, §63, pp. 758, 759, as follows:

> "It is a rule of law that a person who has reserved to himself the right to discharge his obligation under a contract in two or more different ways may elect, at any time before the day of payment has passed, in which way he will discharge it. If he exercises this option by making tender of performance and doing all that it is in his power to do, he cannot be deemed to have lost his right. On the other hand, where a promise is in the

alternative to pay a definite sum of money or its equivalent in property, the promisor has an election either to pay in money or the equivalent, but if he fails to pay in property on the day of payment, the right of election is gone and the promisee is entitled to payment in money. The money in such cases is the primary element of the promise, and a stipulation that it may be discharged by something else is an alternative that the maker may avail himself of at or before the day of payment. If he fails to do so, the primary object of the promise must prevail, and it becomes a moneyed demand. The reason for the rule is that the creditor might reasonably calculate on the value of the property at a particular day. But if it were left to the debtor at his election to make delivery at any indefinite period afterward, he might select that time at which the value of the property would be most depreciated, and thus gain an advantage inconsistent with his contract."

Authorities cited in support of the proposition that if the promisor has an election either to pay in money or in property and fails to pay in property on or before the day of payment, "the right of election is gone and the promisee is entitled to payment in money", include the following:

Texas & R. P. Co. v. Marlor, 123 U.S. 687, 8 S.Ct. 311, 31 L.Ed 303; Trebilcock v. Wilson, 12 Wall. (U.S.) 687, 20 L.Ed 460; Central Trust Co. v. Richmond, N.I. & B.R. Co., (CCA 6th), 68 F. 90, 41 LRA 458, Cert. Den. 163 U.S. 679, 16 S.Ct. 1199, 41 L.Ed 310; Beckwith v. Sheldon, 168 Cal. 742, 145 P. 97, Ann Cas 1916A 963; Cummings v. Dudley, 60 Cal. 383, 44 Am. Rep. 58; and others.

In the Texas & P.R. Co. case, the decision of the Supreme Court of the United States is well summarized in the headnote, as follows:

> "(1) If the Company did not pay the interest in money by the interest day, it was bound to exercise, by that day, its option to pay it in scrip, and, if it did not, it became liable to the bondholders to pay the interest in money; (2) no demand by a bondholder was necessary, in order to entitle him to the payment of the interest in money, on

the failure of the Company so to exercise such option."

In Beckwith v. Sheldon, supra, the Supreme Court of California held similarly:

"(1, 2) Looking to the terms of the agreement, it is easily seen that it is not a mere agreement for the delivery of bonds. The promise is 'that there shall be paid to' Beckwith 'the sum of $59,000.' This is not an agreement to sell or deliver bonds, but a promise to pay money. The addition of the words 'in bonds of the *** company, at par' does not change it into an agreement solely for the delivery of the bonds, but merely gives the payor the option or privilege of making such payment by delivering the bonds as specified when the time of performance arrived. The defendant Central Canal & Irrigation Company, having received the consideration furnished to the enterprise by Beckwith, and having undertaken to perform the obligation to him set forth in the agreement, was bound thereby to the same extent as if it had been a party thereto. When it thereupon refused to perform the obligation,

the promise became an absolute money obligation, and the value of the bonds was immaterial, or at all events the payment in money became immediately due (Brown v. Foster, 51 Pa. 173), and the payee could sue thereon as upon a money obligation, and recover without alleging or proving the value of the bonds."

The Supreme Court of Utah has followed the rule laid down by the Supreme Court of the United States in the Texas & P.R. Co. case. In Meissner v. Ogden, L. & I. Ry. Co., 65 U 1, 233 P. 569, the Court stated:

"By the terms of the notes the Company was obligated to pay the sums named on or before January 21, 1921, with the option to convert the notes into bonds. In substance, the Company had the election to pay the notes in money or in bonds, and its undertaking, in point of time, was to pay in one way or the other on or before January 2, 1921. In Haskins v. Dern, 19 Utah 89, 56 P. 953, Mr. Justice Miner of this court said:

"' Where a debtor has the election to pay either money or property, if he fails to make tender at the time fixed for payment,

he thereby loses his election, and the obligee has the right to demand the money.'"

In the case now before the Court, the trial judge found that after paying the first installment due on the promissory note, Appellees made no further payments on the note. "Neither defendants H. W. Heers or H. W. Heers, Inc., nor their successors in interest, tendered or offered to tender to the plaintiffs herein any payment on said note by way of cash or bona fide notes secured by valid deeds of trust, and not withstanding repeated demands, failed and refused to pay the amount owing under said note and particularly the yearly payment due and payable thereon beginning with September 1, 1962." (Finding No. 11, R. 118).

In view of the foregoing, there appears to be no justification for the trial court permitting Appellees the continued option to pay the promissory note by delivery to Appellants "bona fide notes secured by valid deeds of trust."

## ADDITIONAL ATTORNEY FEES

The trial court further found that Appellants were entitled to their attorney fees incurred in connection with the instant action and determined the sum of $13,000.00 to

be a reasonable amount to be awarded. Since no provision was made for any attorney fees on appeal of this matter, Appellants respectfully request this Court to increase the amount of attorney fees by a reasonable sum to compensate Appellants for the fees incurred in connection with this appeal.

## CONCLUSION

Appellants respectfully submit that the Judgment of the lower court should be modified to delete therefrom any right on the part of Appellees to pay and satisfy the judgment or any part thereof by delivery to Appellants of "bona fide notes secured by valid deeds of trust," and thereby enter a money judgment in favor of Appellants and against Appellees in a specific amount, together with interest costs, and attorney fees (including such additional amount for attorney fees as this Court shall deem appropriate for the prosecution of this appeal), together with Appellants' costs on appeal.

Respectfully submitted,

ARTHUR H. NIELSEN and
FRANCIS RAY BROWN

Attorneys for Appellants.

## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Francis Ray Brown

FRANCIS RAY BROWN